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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1962

No. [redacted] 46

CHARLES A. MEEKER, and his wife, SYBIL MEEKER,
Petitioners,

VERSUS

AMBASSADOR OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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September, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8780

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In the
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OCTOBER TERM, 1962

No. 641

CHARLES A. MEEKER, and his wife, SYBIL MEEKER,
Petitioners,

VERSUS

AMBASSADOR OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Although the facts are stated in the opinion of the Court of Appeals (308 F.2d 875), we will briefly restate the facts.

Hettie E. Lowder owned the NW/4 and W/2 NE/4 of Section 23-16N-4W, Logan County, Oklahoma, containing 240 acres.

On June 3, 1953, Hettie E. Lowder executed and delivered a five-year oil and gas lease to H. S. Smith, covering all the above described land except the W/2 NW/4

(R. 55). By mesne assignments, this lease was assigned to W. G. Haun. On December 30, 1957, Haun assigned the lease to Herman L. Hurst, reserving an overriding royalty of 1/16th of 7/8ths, which said overriding royalty was expressly made applicable to any extensions or renewals of this lease.

On April 30, 1958, Hurst procured from Hettie E. Lowder an oil and gas lease covering the same 160 acres as was covered by the lease assigned to him by Haun, said lease having a term of thirty (30) days from June 30, 1958. This lease was recorded in Book 385, page 694 (R. 47).

Prior to procuring the thirty (30) day oil and gas lease mentioned in the preceding paragraph, Hurst had entered into an agreement with Domestic Oil Corporation, American Drilling Company (an affiliate of Domestic Oil Corporation) and the Meekers, whereunder a test well was to be drilled on the Robinson farm which was situated near the Lowder farm (R. 26). The Robinson farm covers the SW/4 of Section 23-16N-4W (R. 38). The thirty (30) day Lowder lease had been procured by Hurst for the benefit of Domestic Oil Corporation, Hurst and the Meekers. Both the Meekers and Domestic had sold out small interests in the leasehold estate to various parties (R. 56). Domestic was the operator, *i.e.*, in charge of drilling and operating the leases (R. 17).

On July 1, 1958 (two days before the expiration of the primary term of the thirty (30) day lease), at the request of Hurst, a well location was staked on the Lowder farm, and some bulldozer work was done. Nothing was done thereafter at this particular location (R. 33).

On July 22, 1958, Hettie E. Lowder executed and delivered to Ambassador Oil Corporation, in consideration of a cash bonus, an oil and gas lease covering the entire Lowder farm, containing 240 acres. This lease was recorded August 14, 1958, in Book 388, page 639. Before buying the lease Ambassador had made a factual investigation and had consulted with counsel and had been informed by counsel that the thirty (30) day lease had terminated (R. 17).

In the latter part of August, 1958, Domestic Oil Corporation, apparently in ignorance of the Ambassador lease, and apparently believing that the thirty (30) day lease was still effective, caused a well location to be staked on the SW/4 NE/4 in Section 23-16N-4W, and on or about September 6, 1958, spudded a well exploratory for oil and gas at this location (R. 31). As noted hereinabove, this location was at a different location than the well staked by Hurst (R. 58).

Ambassador, upon learning that Domestic was drilling on the Lowder farm, notified Domestic on September 9, 1958, that Ambassador owned the oil and gas leasehold estate covering said land (R. 28). Upon receipt of this notice, Domestic stopped drilling. Domestic's attorney was consulted, and he advised that the thirty (30) day lease was probably dead (R. 37). Negotiations were commenced between Ambassador and Hurst, and as a result of these negotiations Ambassador assigned its oil and gas lease to Domestic insofar as said lease covered the E/2 NW/4, and W/2 NE/4 of Section 23-16N-4W. The assignment from Ambassador to Domestic is dated September 15, 1958, and

was recorded September 30, 1958, in Book 390, page 592. The assignment contained this provision:

> "(a) That the lease hereby assigned is the effective oil and gas lease covering the land hereinabove described, and that the lease of record under which Assignee commenced drilling operations has terminated and is no longer effective; . . . " (R. 59-60).

The assignment of the Ambassador lease was taken for the benefit of all the parties who owned an interest in the thirty (30) day lease (R. 36).

After receiving the assignment of the Ambassador lease, Domestic resumed drilling of the well on the Lowder farm, and, subsequently, the well was completed as a producing oil well on October 4, 1958 (R. 60).

On October 8, 1958, Domestic Oil Company assigned to Charles A. Meeker and Sybil Meeker, as joint tenants, an undivided one-half interest in the Ambassador lease insofar as the lease covers the E/2 NW/4, and W/2 NE/4 of Section 23-16N-4W. The assignment contained this provision:

> "This assignment is made SUBJECT to the TERMS AND PROVISIONS of the agreement dated October 8, 1958, between Assignor and CHARLES A. MEEKER and is SUBJECT to its proportionate part of an outstanding 3/32 OVERRIDING ROYALTY INTEREST and a $2,500.00 oil payment. By accepting this assignment assignees do not recognize the validity of the lease above described and expressly reserve the right to contest its validity. This assignment is SUBJECT to all of the provisions of the lease assignment from the AMBASSADOR OIL CORPORATION to DOMESTIC

OIL CORPORATION recorded in Book 390, Page 592, in the office of the County Clerk of Logan County, Oklahoma" (R. 60).

Although the assignment to Meeker was not made until October 8, 1958, Meeker had been informed of the negotiations with Ambassador immediately after the Lowder well had been shut down because of the Ambassador claim (R. 40).

ARGUMENT

1. There was no right to a jury trial.

The Second Amended Complaint upon which this action was tried stated two causes of action: The first, to quiet title to a 1/16th of 7/8ths overriding royalty claimed under an oil and gas lease that had a primary term of thirty days; and, second, to quiet title and for money damages for an alleged slander of title to that overriding royalty interest.

Jury trial was demanded by endorsement on the Complaint, but was denied on the ground that the action was essentially an equitable action.

At the time the action was filed, and at the time the action was tried, the plaintiffs and their co-owners were in possession of the property producing oil and gas therefrom.

The instant action is not one for a declaratory judgment. It is a quiet title action joined with a claim for slander of title. The plaintiffs in their first cause of action

request that their title be established. In their second cause of action they adopt *all the allegations* of their first cause of action and plead slander of title. The first cause of action obviously states a case in equity. Just as obviously the second cause af action states a claim in equity joined by a claim for money damages.

The plaintiffs brought the action. They pleaded as they saw fit. Since the plaintiffs invoked the aid of equity, and since the very heart of the plaintiffs' claim depends on a determination of title by a court of equity, we submit that the court should be permitted to determine the question of title which the plaintiffs have asked it to determine. Surely the plaintiffs cannot frustrate the determination of any factual questions by the court by merely joining a claim for money damages with a claim for equitable relief.

The plaintiffs have not brought a suit at common law; they have brought an equitable action. And as pointed out in the many decisions of this Court and other courts, equity, having taken jurisdiction, ought to determine all the issues which are incidental to the basic equitable issue. This is not to say that there may not be actions in which the legal issues are so separate and independent from the equitable issues as to be triable separately to a jury; but here the legal claim is so inextricably bound with and dependent upon the equitable issue as to be inseparable therefrom; and the assertion of this legal claim should not convert the entire claim into one triable to a jury.

Professor Moore, in 5 Moore's Federal Practice, Section 38.16 at page 149, states:

"Where the court and jury issues are not factually related, then it is a matter of indifference so far as the mode of trial is concerned whether the court issues are tried first or vice versa. Where, however, the court and jury issues are factually related then it becomes important which type of trial shall be had first. This should be determined by the basic nature of the issue as formulated."

Citing *Camp* v. *Boyd*, 229 U.S. 530, 552 (1912), in Section 38.19(2) at page 169, Professor Moore states:

"If the claim is one properly equitable in character, there is no right to jury on an issue of damages that is incidental to the equitable relief which the claimant seeks. The general rule has often been stated, that equity 'having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law.' In other words, there is no right to jury trial on an incidental issue of damages, even though a demand for jury is made, in an action: to set aside a fraudulent transfer; to reform a contract and, as reformed, to recover damages for its breach; for specific performance and damages for failure to perform at the time when performance under the contract was due; for damages in lieu of specific performance, where there was a basis for equity's jurisdiction but the chancellor in the exercise of a sound discretion declines to decree performance; for injunctive relief against wrongful conduct and to obtain monetary restitution or accrued damages."

In *Porter* v. *Warner Holding Company*, 328 U.S. 395, 399 (1946), this Court said:

"But where, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law. Alexander v. Hillman, 296 U. S. 222, 241, 242, 80 L.Ed. 192, 200, 201, 56 S.Ct. 204."

One may take the view as did the Court of Appeals, that the second cause of action states a claim at law triable to a jury. We believe this view ignores the fact that even in the second cause of action the plaintiffs assert that their title should be quieted thus invoking the aid of equity even in that cause of action.

The plaintiffs were not entitled to a jury trial in the quiet title action. Plaintiffs, together with their co-owners of the working interest, were in possession of the land covered by the oil and gas lease producing oil and gas therefrom. Consequently the plaintiffs did not have to sue for possession. In addition to this, in Oklahoma ejectment will not lie to enforce rights under an oil and gas lease when the lessee has not been in possession. *Lancaster* v. *Kathleen Oil Co.*, 241 U.S. 551, 36 S.Ct. 711, 60 L.Ed. 1161 (1916); *Frey* v. *Glenn*, 206 Okl. 28, 240 P.2d 1061 (1952). Therefore, the plaintiffs neither could nor were required to bring an action in law in ejectment. They had to proceed in equity. A court of equity has jurisdiction between contesting oil and gas lessees claiming from the same lessor. *Gypsy Oil Company* v. *Marsh*, 121 Okl. 135, 248 Pac. 329, 331 (1926).

An action to quiet title is an equitable action. *Perego* v. *Dodge*, 163 U.S. 160, 165, 41 L.Ed. 113, 117 (1896); *Burk-*

hard v. *Burkhard*, 175 F.2d 593 (C.C.A. 10th, 1948); *Humble Oil & Refining Company* v. *Sun Oil Company*, 191 F.2d 705 (C.C.A. 5th, 1951); *Hester* v. *Watts*, 203 Okl. 97, 218 P.2d 641 (1950).

A jury trial is not a matter of right in an equitable action. *Parsons* v. *Bedford*, 28 U.S. (3 Peters) 433, 446, 7 L.Ed. 732, 737 (1830); *Barton* v. *Barbour*, 104 U.S. 672, 676, 26 L.Ed. 672, 676 (1881); *Burkhard* v. *Burkhard*, 175 F.2d 593 (C.C.A. 10th 1948); *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corporation*, 124 F.2d 563 (C.C.A.2d 1942); 31 Am. Jur., Jury, Sec. 24.

A court of equity having taken jurisdiction will retain jurisdiction in order to grant complete relief. *Camp* v. *Boyd*, 229 U.S. 530, 551, 552, 33 S.Ct. 785, 57 L.Ed. 1317, 1327 (1913); *Barton* v. *Barbour*, 104 U.S. 126, 26 L.Ed. 682 (1881); *Schaefer* v. *Gunzburg*, 246 F.2d 11, 15 (C.C.A. 9th, 1957) (*cert. denied* 355 U.S. 831, 2 L.Ed.2d 43); 5 Moore's Federal Practice, 2nd Ed., paragraph 38.19(2), page 169; 19 Am. Jur., Equity, Secs. 125, 127, pages 125 and 126.

In *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1, 48, 57 S.Ct. 615, 81 L.Ed. 893, 918 (1936), this Court speaking through MR. CHIEF JUSTICE HUGHES, said:

> "The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted . . . (citing cases). Thus it has no application to cases where recovery of money damages

is an incident to equitable relief even though damages might have been recovered in an action at law . . . (citing cases)."

The right to a jury trial in a diversity case is to be determined by federal law. *Simler* v. *Conner*, 372 U.S. 221 (1963). However, as that case points out, the fact that the action is one for declaratory judgment will not be determinative of the character of the action as being one at law or in equity.

In *Holland* v. *Challen*, 110 U.S. 52, 56, 28 L.Ed. 52, 56 (1884), it was said:

"It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

In *Camp* v. *Boyd*, 229 U.S. 530, 552, 57 L.Ed. 1317, 1327, a suit was brought in equity to enjoin the prosecution of an action of ejectment. A tract of land had been divided into three parcels. The plaintiff had equitable title only to two of the parcels, and legal title to the third parcel. At page 1327 the Court said:

"A court of equity ought to do justice completely, and not by halves. (citing authorities.)

"One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights

that otherwise would not be within the range of its authority. (citing authorities)."

Having evoked the aid of equity to establish the very right upon which their claim for damages depends, the plaintiffs should not be heard to urge that the court, without the intervention of a jury, had no right to consider the case. If the claim for damages can be decided only by a jury, and if the claim for damages must be heard either prior to a determination of the equity question, or simultaneously therewith, manifestly it would be impossible for the case to be tried except by a jury. In effect every equitable action, by the assertion of a claim for damages, would be transformed into a jury action. We submit that this result is not desirable, or workable.

We submit that the right to a jury trial should be governed by determining whether the basic character of the action is legal or equitable. This Court has recognized this principle as is shown by the cases cited. This is the rule in Oklahoma as is shown by *Russell* v. *Freeman*, 202 Okl. 421, 214 P.2d 443 (1950). It seems to be the test which is applied in most jurisdictions. 31 Am. Jur., Jury, Secs. 24 and 25.

The basic nature of the issue controls, even in a declaratory judgment action. 5 Moore's Federal Practice, 2nd Ed., Sec. 38.16, page 153.

This philosophy was expressed in *Institutional Drug Distributors* v. *Yankwich*, 249 F.2d 566, 569 (C.C.A. 9th, 1957), wherein the Court said:

> "It is not on every complaint now filed that a jury trial is accorded, even if there are issues normally triable at law and even if there is the requisite demand therefor. The Federal Rules of Civil Procedure did not change these princples, but affirmed them, since specific reference is made to the Seventh Amendment. A law action may be pleaded in the same complaint as a suit in equity. But, if the whole matter fall within the limits of equity jurisdiction, even separate statement and timely demand will not suffice. It is obvious also that although an independent counter-claim can be, and often must be pleaded under the Rules, it does not change the limits of equity jurisdiction."

Any other rule leads to procedural difficulties which are profound. If all questions of fact which relate to an incidental issue in an equitable action, which, if unrelated, would have been triable to a jury at common law, must be segregated and submitted to a jury, procedural chaos results. The end result of such a rule will be the impanelment of a jury in every case—in cases which are basically equitable, a needless imposition upon the time of citizens who are compelled to serve upon an unnecessary jury.

In *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 3 L.Ed.2d 988 (1959), the plaintiffs sought relief by asking for a declaratory judgment and an injunction which would prevent the defendant from claiming treble damages under the anti-trust laws. This Court held that the plaintiff could not deprive the defendant of his right to a jury trial by striking a blow in equity to defeat a claim which was clearly at law.

In *Dairy Queen* v. *Wood*, 369 U.S. 469, 8 L.Ed.2d 44 (1962), the plaintiff asked for equitable relief in connection

with a legal claim, and this Court held that the plaintiff could not, by coupling with his claim at law, a request for equitable relief, deprive the defendant of his right to a jury trial on the legal claim.

Neither of these cases is conclusive in the instant case. Here the plaintiffs are making the claim; they claim in equity and ask damages as part of their remedy. Even if this Court decides that the claim for slander of title is not an incident to the quiet title suit, we submit that the plaintiffs, by making the claim, should not be permitted to tie the hands of the court of equity whose aid they had invoked. In other words, it should not be held that the entire matter must be submitted to a jury.

We believe that every case decided by this Court in which it has been held that a jury has been wrongfully denied, when closely analyzed, will reveal that the result has depended on the basic issue being one triable to a jury at law.

If the basic issue test provides no acceptable standard, and if the incidental rule has no particular relevancy, then we submit that this Court should not adopt a rule which would necessitate a jury trial in every case where the plaintiff joins with his claim for equitable relief a claim which would be triable to a jury. In such a situation, we submit, the trial court should be permitted to try the equity case without regard to the jury claim. If the disposition of the equity claim shows that there is no merit in the jury claim, this should end the matter. After all, in such a case the plaintiff invoked the aid of the court of equity.

2. If the plaintiffs were entitled to a jury trial, denial thereof was harmless error.

The trial court denied the plaintiffs' claim on two grounds: (1) On the ground that the thirty-day lease terminated when drilling operations were not pursued with due diligence; and (2) On the ground that the plaintiffs had ratified the settlement and compromise agreement between Ambassador and Domestic Drilling Company whereunder it was agreed that the thirty-day lease had terminated (R. 19). The trial court made a specific finding that no malice had been proven against Ambassador (R. 18). The opinion of the Court of Appeals fully concurred in the conclusion of the trial court respecting termination of the lease and the ratification of the compromise agreement (R. 65, 66, 67). The opinion of the Court of Appeals did not reach the question of malice, presumably because this issue was raised in connection with the alleged slander of title set forth in the second cause of action which the court found it unnecessary to consider (R. 66).

The plaintiffs admitted that no operations had been conducted between July 2 and the latter part of August. They sought to excuse this lack of diligence for a legal reason: namely, a possibility of well spacing by the Oklahoma Corporation Commission. Both the trial and the appellate court held that the mere possibility that the Corporation Commission might space the area for drilling for and the production of oil and gas did not constitute a valid reason for failure to pursue the drilling operations with due diligence (R. 19 and 65). That the mere possibility of the establishment of drilling and spacing units would not

prohibit drilling or constitute a legal excuse for not drilling, seems obvious. There was no application for spacing filed until July 16, 1958 (R. 58), and the operations on the Lowder land under the thirty-day lease had commenced July 2. The well could have been spudded and drilled to completion without being affected by the spacing application or the order creating forty-acre spacing which was entered in September. Title 52, O.S.A., Sec. 87.1 (see Appendix), provides that after the entry of a spacing order no well may be drilled at a location other than that fixed by the order. This statute also provides that no well covered by a pending spacing application may be drilled at a location other than that approved by an order of the Commission. Obviously, these provisions do not apply to the well which had been commenced prior to the filing of the application or the entry of the spacing order. The spacing orders themselves grant exceptions for wells theretofore drilled. The spacing order which was entered in September gave an exception for the Robinson well and would have provided for an exception for the Lowder No. 1 had the drilling of that well been continued (R. 65).

The plaintiffs sought to justify the delay in drilling by a legal impediment which in fact did not exist. Both the trial court (R. 19), and the Court of Appeals (R. 66) found that there was no legal impediment to the continuation of drilling operations. Both the trial court (R. 19) and the Court of Appeals (R. 66) held the thirty-day lease terminated for failure to pursue the drilling operations with due diligence. There was no contention by the plaintiffs that anything was done on the Lowder lease between July 2

and the latter part of August; there was no contention that there was any drilling prior to early September (R. 33).

The trial court correctly concluded, as a matter of law, that the thirty-day lease terminated for failure to pursue the operations with diligence. The determination was not one of fact; it was one of law. The facts were not in dispute.

In *Frank Oil Co.* v. *Belleview Gas & Oil Co.*, 29 Okl. 719, 119 Pac. 260, 265 (1911), the Court said:

> "In Superior Oil & Gas Co. v. Mehlin, 25 Okl. 809, 108 Pac. 545, 138 Am.St.Rep. 942, it was held: 'A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases; and, owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly against the lessee and in favor of the lessor.'
>
> "This contract is an option to explore for gas and oil. The rule is settled by this court that, when contracts are optional in respect to one party, they are strictly construed in favor of the party that is bound and against the party that is not bound. Kolanchny v. Galbreath et al., 26 Okl. 772, 110 Pac. 902; Jones v. Moncrief-Cook Co., 25 Okl. 856, 108 Pac. 403."

In *Stephenson* v. *Calliham*, 289 S.W. 158, 159 (Civ. App., 1926), a well was commenced on an oil and gas lease four days before the end of the primary term. The hole was drilled to a depth of 153 feet and thereafter the lessee moved the rig from the premises. Six weeks later the lessor brought suit to quit title against the lease. The lessee contended

that notice of intention to forfeit must be given. The Court, in holding that the lease had terminated, said:

> "But that is not the case presented here. The 2-year period provided for in the lease expired on May 16, 1924. The lessee had commenced operations in accordance with the stipulations of the contract, which preserved the lease to the end of the stipulated period. From that day on the lease period could be projected only by continuous operations, so that the moment these operations ceased from any cause, other than the act of God, the public enemy, or the government, the lease ipso facto terminated, and could not be revived by any act of the lessee. It became absolutely inoperative. Under no provision of the contract could the lessee reenter and resume operations which he had previously discontinued."

In *Prowant* v. *Sealy*, 77 Okl. 244, 187 Pac. 235, 240 (1920), the Court said:

> ". . . if drilling operations were commenced on the premises within the three years for the purpose of discovering oil or gas and were still being prosecuted in good faith at the expiration of the three-year period, the term was thereby enlarged or extended during the continuance of such drilling operations . . ."

In the instant case the drilling operations ceased without legal cause, and the lease died.

Besides, any oral extension which Mrs. Lowder might have given would not bind Ambassador in the absence of knowledge. *Pierson* v. *McCrory*, 93 Okl. 117, 219 Pac. 641 (1923).

The plaintiffs attempted to extend the thirty-day lease by a token operation. Hurst attempted to get an extension of the lease from Mrs. Lowder, and testified he got an oral extension (R. 26); however, the trial court found no oral extension was given (R. 17). As a matter of law an oral extension would violate the Statute of Frauds. In Oklahoma an oil and gas lease conveys an interest in realty which is within the Statute of Frauds. *Gutowsky* v. *Jones*, 178 F.2d 60, 63 (C.C.A. 10th, 1949).

2 Summers Oil & Gas (Perm. Ed.), Sec. 302, page 276, states the rule regarding extensions of oil and gas leases as follows:

> "The primary term of an oil and gas lease may be changed or extended by a valid agreement between the parties, but such agreement is, in effect, a new lease or modification of an existing one and must satisfy the same requirements for validity and be executed with the same formalities as the original lease . . ."

See 37 C.J.S., Frauds, Statute of, Sec. 113, page 605.

In addition to the fact that the thirty-day lease terminated as a matter of law, the plaintiffs are estopped to deny that it did not. Not only did the plaintiffs accept an assignment of an interest in the Ambassador lease, but the plaintiffs also signed division orders and accepted payments under the Ambassador lease (R. 34, 42, 43).

On the question of estoppel there would be no question for a jury; the facts are admitted and we submit that the estoppel and ratification was established as a matter of law.

15 O.S.A., Sec. 75, is as follows:

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known to the person accepting."

One who purchases property under a deed which recites that the land is subject to another's lease cannot deny or dispute the lease. *Williamson* v. *Davis*, 74 Okl. 174, 177 Pac. 567 (1919).

In *Bush* v. *Person*, 18 Howard 82, 15 L.Ed. 273, 274 (1856), it was said:

> "It is familiar law, also, which was applied in Carver v. Jackson, 4 Pet. 86, 88, that a mere recital of fact in a deed is as effectual an estoppel as a covenant."

And on yet another ground there would have been no case for the jury. Under the Oklahoma law malice is a necessary element in a slander of title suit. *Keiser* v. *Kile*, 166 Okl. 41, 26 P.2d 194, 195 (1933), wherein the Court said:

> "The principal element in a suit for slander of title is malice. There must have been some malicious intent upon the part of the defendant at the time of doing the act complained of to constitute malice."

There is no dispute that Ambassador's representative consulted counsel and was advised that the thirty-day lease had terminated (R. 17). Domestic Oil Corporation was advised by its lawyer that the thirty-day lease had terminated

(R. 37). Mr. Meeker, one of the plaintiffs, knew that Domestic had been so advised (R. 42).

Advice of counsel is a complete defense in Oklahoma to a claim of slander of title. *Noble* v. *Johnson*, 180 Okl. 169, 68 P.2d 838 (1937). Not only did Ambassador's counsel advise Ambassador that the thirty-day lease had terminated, opposing counsel representing parties claiming adversely to the Ambassador lease so advised his clients. Under the circumstances, there would have been no question of malice to submit to the jury.

The court may direct a verdict where the plaintiff fails to prove a case. *Galloway* v. *U. S.*, 319 U.S. 372, 389, 87 L.Ed. 1458, 1470 (1942); *New York, New Haven & Hartford Ry. Co.* v. *Henagan*, 364 U.S. 441, 5 L.Ed.2d 183 (1960).

28 U.S.C. 2111 provides:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Denial of a jury trial is harmless error where there was no question to submit to the jury. *Forster* v. *Insurance Co. of N. Am.*, 139 F.2d 875 (C.C.A. 2d, 1944); *Freeman Contractors Inc.* v. *Central Surety Insurance Corp.*, 205 F.2d 607 (C.C.A. 8th, 1953); *Orenstein* v. *U. S.*, 191 F.2d 184 (C.A. 1st, 1951); *Tanimura* v. *U. S.*, 195 F.2d 329 (C.A. 9th, 1952).

CONCLUSION

It is submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

52 O.S.A., Section 87.1(d) in part provides:

> "The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other than that approved by a special order of the Commission authorizing the drilling of such well, is hereby prohibited. The operation of any well drilled in violation of any spacing so entered is also hereby prohibited."